No. 488

In the Supreme Court of the United States

OCTOBER TERM, 1961

UNITED STATES OF AMERICA, APPELLANT

v.

RAYMOND J. WISE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

JURISDICTIONAL STATEMENT

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CITATIONS

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OPINION BELOW

The memorandum and order of the district court (Appendix A, *infra*, pp. 20–25) is not yet reported.

JURISDICTION

The indictment was filed under Section 1 of the Sherman Act (26 Stat. 209, as amended, 15 U.S.C. 1) and Section 3 of the Robinson-Patman Act (49 Stat. 1528, 15 U.S.C. 13a). The order of the district court dismissing counts 11 and 12 of the indictment as to the appellee Wise, on the ground that Section 1 of the Sherman Act does not apply to the offenses charged against him, was entered on August 10, 1961 (Appendix B, *infra*, pp. 25–26), and the

notice of appeal was filed on August 11, 1961.[1] The jurisdiction of this Court to review by direct appeal the order of dismissal is conferred by the Criminal Appeals Act, 18 U.S.C. 3731. *United States* v. *Hutcheson,* 312 U.S. 219; *United States* v. *Borden Co.,* 308 U.S. 188.

STATUTES INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 69 Stat. 282, 15 U.S.C. 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *. Every person who shall make any contract or engage in any combination or conspiracy declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 14 of the Clayton Act, 38 Stat. 736, 15 U.S.C. 24, provides:

> That whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have au-

[1] The district court had previously dismissed the counts charging the National Dairy Products Corporation and Wise with violations of Section 3 of the Robinson-Patman Act, on the ground that that section is unconstitutionally vague. The government's appeal to this Court from that dismissal is pending on motion to dismiss or affirm. No. 173, this Term.

thorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding $5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court.

QUESTION PRESENTED

Whether a corporate officer may be prosecuted under Section 1 of the Sherman Act for antitrust violations committed in the course of his corporate duties.

STATEMENT

Counts 11 and 12 of the indictment in this case (filed on September 16, 1959) charged the National Dairy Products Corporation ("National") and appellee Wise, a vice president and director thereof, with conspiring, together with designated co-conspirators and unknown persons, to eliminate price competition in the sale of fluid milk in the Kansas City area, in violation of Section 1 of the Sherman Act. Each of these counts alleged that, during the period covered thereby, Wise had been "actively engaged in the management, direction, and conduct of the affairs, policies and acts of National, and has authorized or ordered to be done some or all of the acts alleged * * * to have been done by National" (R. 25, 28).[18]

On August 19, 1960, Wise moved to dismiss counts 11 and 12 as to him on the ground that "they fail to charge him with an offense under Section 1 of the

[18] "R." refers to the record and "S.R." to the supplemental record on file in the Clerk's Office.

Sherman Act * * *" (S.R. 1). In a supporting statement he alleged that "Section 1 of the Sherman Act does not impose criminal responsibility upon corporate officers charged only with authorizing, ordering or doing corporate acts constituting a corporate violation. To the contrary, the prosecution of corporate officers for such acts is governed by Section 14 of the Clayton Act, 15 U.S.C., § 24" (S.R. 7). Wise also moved for a bill of particulars requiring the government to state, among other things, whether he was alleged to have participated in the offenses charged against him in those counts "in any capacity other than as a director, officer, or agent who has authorized, ordered or done any of the acts constituting in whole or in part the violations alleged to have been committed" by National (R. 40).

The district court denied the motion to dismiss, but sustained the motion for particulars insofar as it requested the foregoing information (R. 50). In response, the United States stated that Wise "is personally charged with actively and directly engaging in the illegal conduct charged in Counts Eleven and Twelve of the indictment," and that, in doing so, he was "acting solely in his capacity as an officer, director or agent who authorized, ordered or did some of the acts constituting in whole or in part the violations alleged also to have been committed" by National (R. 57).

Wise then renewed his motion to dismiss on the ground that "said counts, in themselves and as made more specific by [the] Bill of Particulars * * * fail to charge him with an offense under Section 1 of the

Sherman Act * * *" (R. 58). The district court granted the motion and, on August 10, 1961, entered an order dismissing counts 11 and 12 as to Wise (App. B, *infra*, pp. 25–26).

The court held that a corporate officer, "charged solely in his representative capacity and not in any degree on an individual basis for his own personal account," may not be prosecuted under Section 1 of the Sherman Act, but only under Section 14 of the Clayton Act (App. A, *infra*, p. 22). The court ruled (*id.*, pp. 22–23) that "the Sherman Act governs the prosecution and punishment of principals, i.e., corporations and individuals acting on their own behalf, while Section 14 of the Clayton Act covers the prosecution and punishment of individuals who, as corporate officials, took part in the corporate violation." In its order of dismissal, the court stated (App. B, *infra*, p. 26) that Wise "cannot be charged" with a violation of Section 1 of the Sherman Act "on the basis of" acts committed by him "solely in his capacity as an officer, director, or agent who authorized, ordered, or did some of the acts constituting in whole or in part the violations alleged also to have been committed" by National.

THE QUESTION IS SUBSTANTIAL

This appeal presents an important question of first impression regarding the inter-relationship of Section 1 of the Sherman Act and Section 14 of the Clayton Act with respect to the criminal liability of corporate officials for antitrust violations committed in the course of their corporate duties. Section 1 of

the Sherman Act provides that "[e]very person" who engages in an illegal conspiracy or combination in restraint of trade is guilty of a misdemeanor and, upon conviction, may be fined up to $50,000, or imprisoned up to one year, or both; and Section 7 of that Act defines "person" to include "corporations" and "associations." Section 14 of the Clayton Act provides that, whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation "shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered or done any of the acts constituting in whole or in part such violation"; makes such violation a misdemeanor; and imposes a maximum fine of $5,000, or maximum imprisonment of one year, or both. The district court held that a corporate official may not be prosecuted under Section 1 of the Sherman Act for antitrust violations committed by him in his corporate capacity, but only under Section 14 of the Clayton Act.

The effect of this ruling is that such officials are subject only to the $5,000 maximum fine provided by Section 14, and not to the $50,000 maximum fine imposed by the Sherman Act. In addition, the requirement that the government proceed under Section 14 against the officials, while at the same time proceeding under the Sherman Act against the corporation, would create various problems at the trial. See note 11, *infra*, p. 18.

The novel holding of the district court rests upon a basic misconception of the purpose which Con-

gress intended Section 14 to serve. Contrary to the view of the court below, Section 14 was not designed to eliminate "confusion and uncertainty" (App. A, *infra*, p. 22) that had existed as to whether corporate officials were criminally liable under the Sherman Act; such liability was already established when the Clayton Act was enacted in 1914. The primary purpose of Section 14 was to strengthen the criminal prohibitions of the antitrust laws so as to reach conduct by corporate officials which might not otherwise constitute a violation of the Sherman Act, either because such individuals had not personally and directly participated in the corporate violations, or because their conduct was not sufficient to make them parties to the illegal conspiracy. To achieve this end, Congress provided in Section 14 that corporate officers, directors or agents were to be criminally liable if they authorized, ordered or did any of the acts constituting in whole or in part the corporate violation. It did not, however, thereby abolish the criminal liability to which corporate officials were already subject for Sherman Act violations committed in their corporate capacities.

1. Prior to the enactment of the Clayton Act in 1914, the criminal liability of corporate officials for violations of the Sherman Act had been repeatedly recognized. In many of the early criminal cases under the Sherman Act, the validity of an indictment charging both the corporation and its officers under Section 1 was accepted without challenge. See *e.g., United States* v. *New Departure Manufacturing*

Co., 204 Fed. 107 (W.D. N.Y., 1913). As early as 1906, it was held that the unqualified language in Section 1, that "[e]very person" who engaged in a combination or conspiracy in restraint of trade was guilty of a misdemeanor, covered not only corporations but also corporate officials who had participated in their company's violations. In the leading case of *United States* v. *MacAndrews & Forbes Co.*, 149 Fed. 823 (S.D. N.Y., 1906), the indictment charged two corporations and their respective presidents with conspiring to restrain trade, although the officers were alleged to have acted solely in behalf of their companies. In rejecting the contention that the individuals and the corporations had been improperly joined in the same indictment (the claim being that either the corporations, or their presidents, but not both, had committed the crimes charged), the court stated (p. 832, emphasis added):

> When the statute declares that certain acts notoriously to be accomplished under modern business conditions only through corporate instrumentality shall be misdemanors [*sic*] and further declares that the word "person" as used therein shall be deemed to include corporations, such statute seems to me clearly passed in contemplation of the elementary principle that in respect of a misdemeanor all those who personally aid or abet in its commission are indictable as principals. * * * I am compelled to the conclusion that, under this statute, ***if the officer or agent of a corporation charged with fault be also charged with personal participation, direction, or activity therein, both may be so charged in the same indictment.*** * * *

In *United States* v. *Winslow,* 195 Fed. 578 (D. Mass., 1912), two indictments charged that corporate officials who were "actively engaged in the management of the business and affairs of [their] companies," but not the companies, had violated Sections 1 and 2 of the Sherman Act. In denying motions to dismiss based on the claim that the Sherman Act did not apply to individuals who "are only officers or directors" of their corporations, the court relied on the principle (which the court had also relied on in the *MacAndrews* case, *supra*) that "all parties active in promoting a misdemeanor, whether agents or not, are principals," and concluded that an officer cannot "protect himself behind a corporation where he is the actual, present, and efficient actor" (195 Fed. at 581). In *United States* v. *Patterson,* 201 Fed. 697 (S.D. Ohio, 1912), affirmed, 222 Fed. 599 (C.A. 6), the court upheld an indictment charging a large number of corporate officers and employees, whose position ranged from president to salesman, with violating Sections 1 and 2 of the Sherman Act. See also *United States* v. *Swift,* 188 Fed. 92 (N.D. Ill., 1911).[2]

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[2] The district court below also cited *Nash* v. *United States*, 229 U.S. 373, and *Union Pacific Coal Company* v. *United States*, 173 Fed. 737 (C.A. 8), as having cast "doubt and uncertainty" on whether, prior to the Clayton Act, corporate officials were criminally liable under the Sherman Act (App. A, *infra*, p. 21). Neither case so indicated.

In *Nash*, corporate officials and their corporations were indicted for violating Sections 1 and 2 of the Sherman Act. Four of the officials were convicted, but the jury could not reach a verdict with respect to the corporation. In this Court,

> It was argued with a good deal of force that the only evidence of the alleged conspiracy was certain acts done

2. The Clayton Act was designed to close various loopholes that had developed in the Sherman Act. The purpose of Section 14, as stated by Representative Floyd, the member of the House Judiciary Committee who was the floor spokesman for that provi-

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on behalf of the corporations; that the only ground for charging the defendants who were found guilty was their relation to the companies and their being presumably cognizant of and more or less responsible for the corporate acts; that if those acts tended to prove a conspiracy they proved that the corporations more clearly than any one else were parties to it, and therefore that a verdict that was silent as to them [the corporations] ought to be set aside. * * * [229 U.S. 379.]

The Court, however, found it unnecessary to "consider * * * whether on the evidence it was possible to find the defendants guilty by reason of an intent not shown to be shared by the corporations, as the judgment must be reversed for another reason" (*ibid.*).

Any doubt which this Court may have had in *Nash* as to the guilt of the corporate officers was not as to the propriety of prosecuting them under the Sherman Act, but as to the validity of convicting them and not the corporations in circumstances indicating "that if those acts tended to prove a conspiracy they proved that the corporations more clearly than any one else were parties to it".

In *Union Pacific Coal Company* v. *United States*, *supra*, 173 Fed. at 744–745, the question was whether a single officer of a corporation could engage in an unlawful combination with his corporation to violate the antitrust laws, in a situation in which "the evidence was insufficient to sustain a conviction of either of them [the coal corporation or the individual] of an unlawful combination with Buckingham [an agent of two defendant railroad companies] or with either of the railroad companies" (173 Fed. at 744). The court, in holding that he could not, made clear that if more than one individual defendant had been guilty of the illegal acts or if a corporate defendant other than the one which employed the single individual had been similarly guilty, a conviction could have been sustained.

sion, "was to make it clear that, when a corporation had been guilty, those officers, agents, and directors of the corporation that either authorized, ordered or did the thing prohibited should be guilty" (51 Cong. Rec. 9609). Representative Floyd repeatedly pointed out to the House that Section 14 went beyond the prohibitions in the Sherman Act, since the latter already provided penalties for antitrust violations committed by corporate officials, and that Section 14 was not a substitute for, but rather was a supplement to, the existing criminal penalties imposed by the Sherman Act on corporate officials.[3]

Thus, he stated that "[u]nder the existing law, and without that provision of the statute, the person who did the things would undoubtedly be guilty" (51 Cong. Rec. 9609); that Section 14 "in no way affects the procedure under existing law, either criminal or civil. If an individual is guilty of violating the Sherman law, he can be indicted independently of this provision * * *" (51 Cong. Rec. 9679); and that corporate officials who "commit acts held to be unlawful" would continue to be liable under the Sherman Act, with the new provision reaching the other responsible corporate officials "we cannot now reach

[3] Representative Floyd was the principal spokesman in the House for the proponents of Section 14. In addition, Representative Lenroot, in introducing a clarifying amendment to Section 14 that was accepted, stated that the section was intended to make corporate officials liable for violations of the Sherman Act "where they have contributed in any degree to the violation, although their act, standing alone, might not be a violation" (51 Cong. Rec. 9681).

under existing law" (51 Cong. Rec. 9678-9679). He stated that Section 14 was "broader than the original law," since "under the Sherman law as it is now written you can convict an officer for violation of its provisions, but his acts must constitute the whole offense, or he must be a conspirator, and come within the rules of law governing conspiracies, but under this provision if he does any of the acts which constitute in whole or in part that violation, then he may be convicted as an individual" (51 Cong. Rec. 16320). He also emphasized that

> * * * we have not disturbed the text of the Sherman law. We have not disturbed the penal provisions in the existing antitrust laws, including the Sherman law. We have, on the contrary, supplemented the penal provisions of the Sherman law and of other existing antitrust laws. [51 Cong. Rec. 16317.]

In response to the question, asked when the conference report was under consideration, whether "the criminal clauses of the Sherman law are still in force and that this act simply supplements them?", Representative Floyd replied: "Certainly; that is correct." He was then asked: "And that those criminal clauses are not repealed?" His answer was: "They are not repealed in any sense, and I thank the gentleman for asking the question." 51 Cong. Rec. 16319.

While there was substantial opposition in Congress to Section 14, both the opponents and the proponents of this provision recognized that corporate officials were already liable under Section 1 of the Sherman

Act.[4] Indeed, the primary ground of opposition was that, since corporate officers were so liable, the proposed broadening of the criminal prohibitions in Section 14 was unnecessary and might even narrow the existing criminal penalties on corporate officials because it was narrower than the aiding and abetting statute. 51 Cong. Rec. 16275.

There are statements in the legislative history, mainly by opponents of Section 14, which indicate a contrary view.[5] But, viewed as a whole, the clear weight of the legislative history supports the conclusion that Section 14 of the Clayton Act was intended by its sponsors to extend the criminal penalties of the Sherman Act to acts by corporate officers, directors or agents which previously had not subjected them to liability under the Sherman Act. Both the legislative history, and the basic purpose of Con-

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[4] Members of the House Judiciary Committee were specifically informed of the adequacy of the Sherman Act to prosecute corporate officials who conspired on behalf of their corporations. A detailed discussion of the *MacAndrews* case was given by a former Special Assistant to the Attorney General at the hearings. Hearings before the House Committee on the Judiciary, 63rd Cong., 2d Sess., Serial 7, Part 6, pp. 270–272 (1914).

[5] We find nothing to the contrary in the statements in the House and Senate Reports on the Clayton Act (which otherwise do little more than set out the proposed language of the section) that "whenever" corporate officers are deemed guilty of a misdemeanor under the section they "shall be punished as prescribed in the section." See H. Rep. No. 627, 63rd Cong., 2d Sess., p. 20; S. Rep. No. 698, 63rd Cong., 2d Sess., p. 17. This statement does not indicate that Section 14 was intended to be the exclusive remedy for punishing corporate officials, regardless of the nature of their offense.

gress in enacting the Clayton Act to close the loopholes in the Sherman Act, refute the holding below that Section 14 was intended to be a complete substitute for, rather than merely a supplement to, the criminal penalties imposed by the Sherman Act upon corporate officials. In any event, a far stronger showing in the legislative history of a congressional intent to exclude corporate officials from the criminal penalties of Section 1 would be necessary before the unqualified application of that section to "[e]very person" should be qualified, as the court below interpreted it, to read "[e]very person, other than a corporate official acting in his corporate capacity." Cf. *United States* v. *Dotterweich*, 320 U.S. 277.

3. Following the adoption of the Clayton Act, the government continued, as before, to indict under the Sherman Act corporate officers who, in their corporate capacities, had violated that act.[6] During the 47 years between the passage of the Clayton Act and the present case, there was only one indictment which charged a corporate official under Section 14 of the Clayton Act.[7] Moreover, although there were dozens of indictments filed against corporate officers during that period, there were only three cases in which any

[6] See *e.g.*, *United States* v. *S. H. Cowell*, Cr. C 7308–22 (D. Ore.) (indictment returned October 27, 1916 charging price-fixing conspiracy by officers and agents of cement companies); *United States* v. *Walker G. St. Clair*, Cr. 32,953 (Sup. Ct. D.C.) (indictment returned July 6, 1917 charging agents of baking companies of price fixing in violation of Section 1 of the Sherman Act).

[7] *United States* v. *Potts*, Criminal 56–157–M (D. Mass.) (indictment filed June 28, 1956).

question was raised as to the effect of Section 14, and in all three the propriety of the Sherman Act charge was sustained. *United States* v. *National Malleable & Steel Castings Co.*, 6 F. 2d 40 (N.D. Ohio), and related cases;[8] *United States* v. *General Motors Corp.*, 26 F. Supp. 353 (N.D. Ind.); *United States* v. *Atlantic Commission Co.*, 45 F. Supp. 187 (E.D. N.C.).

In the *National Malleable* case, *supra*, the indictment charged 52 corporations and 49 officers of those corporations with violating Section 1 of the Sherman Act. The court, concluding that the individuals were charged as "officers having the active management, direction, and control of the interstate trade and business of the corporate defendants engaged in the illegal combination or conspiracy," held that, while a crime was also charged under Section 14 of the Clayton Act, "[i]f the allegations of the indictment are proved, each and all of the defendants are guilty of a violation of section 1 of the Sherman Act" (6 F. 2d at 41). In both the *General Motors* and the *Atlantic Commission* cases, *supra*, the indictment charged, in a single count, corporate officers acting solely in their representative capacities and their corporations with violation of the Sherman Act. In each case, the court upheld the indictment against the claim that it was duplicitous because conduct amounting to a violation of Section 14 of the Clayton Act had been improperly charged in the same count

[8] See *United States ex rel. McGrath* v. *Mathues*, 6 F. 2d 149, 153 (E.D. Pa.); *Fitzgerald* v. *United States*, 6 F. 2d 156 (C.A. 1); *Meehan* v. *United States*, 11 F. 2d 847, 850 (C.A. 6); cf. *United States* v. *Moore*, 7 F. 2d 734 (E.D. Ill.).

as a violation of the Sherman Act. While it may be true, as the court below stated (*infra*, p. 21), that those cases "have recognized the applicability [of Section 14] where individual defendants as officers having active management, direction and control of the corporation, have been indicted," the significant fact is that in all three cases the propriety of the indictment of the corporate officers under the Sherman Act was sustained.* These cases, and the government's long settled and well established practice of indicting corporate officials for antitrust violations under the Sherman Act, both before and after passage of the Clayton Act, are persuasive evidence that Section 14 of the Clayton Act was not intended to be the sole penal provision governing such violations.

4. Further support for the view that corporate officials are subject to prosecution under Section 1

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* In *Hartford-Empire Co.* v. *United States*, 323 U.S. 386, the provisions of an antitrust decree ran not only against the corporate defendants who were found to have violated the law, but also against "various individual defendants who in the past have acted as, and who at present are, officers or directors of the corporate defendants" (p. 433). This Court, although holding that these individuals "offended against the antitrust laws by acting on behalf of, or in the name of, a corporate defendant," concluded that "[t]here is no apparent necessity for including them *individually* in each paragraph of the decree which is applicable to the corporate defendants * * *" (pp. 433–434, emphasis added). The Court then added (pp. 434–435, footnotes omitted): "That these individuals may have rendered themselves liable to prosecution by virtue of the provisions of § 14 of the Clayton Act is beside the point, since relief in equity is remedial, not penal." But this brief reference to criminal liability under Section 14 of the Clayton Act contains no intimation that the officials might not also be prosecuted under the Sherman Act.

of the Sherman Act is found in the action of Congress in 1955 in raising the maximum fine for violations of the Sherman Act from $5,000 to $50,000, while making no change in the $5,000 maximum fine under Section 14 of the Clayton Act. 69 Stat. 282. The lack of any change in the penalty under Section 14 was not an oversight. Bills introduced in earlier Congresses to increase antitrust penalties had proposed the same increase in the maximum fine under Section 14 as were proposed under the Sherman Act (see H.R. 7035 and S. 2719, 76th Cong., 1st Sess.; H.R. 6679, 81st Cong., 2d Sess.). At the hearings on one of those bills, however, a representative of the Department of Justice testified that the Department was "not urging the enactment" of increased fines for violation of Section 14, since it was primarily concerned with increasing the penalties for violations of the Sherman Act (see Hearings before the Subcommittee on Study of Monopoly Power of the House Committee on the Judiciary, 81st Cong., 2d Sess., Serial 14, Part 3, pp. 4–5; see also, *id.*, p. 15; 96 Cong. Rec. 8071).

The increase in the penalties under the Sherman Act, but not under Section 14 of the Clayton Act, is fully consistent with our view that the latter section was merely intended to reach conduct by corporate officers, directors or agents which, although not previously punishable as a violation of the Sherman Act, nevertheless indicated sufficient culpability to warrant punishment. It seems highly unlikely that, if corporate officers were to be punishable solely under Section 14, Congress would not have increased

the maximum fine thereunder to $50,000 at the same time that it increased the fine under the Sherman Act.

5. The contention that Section 14 of the Clayton Act provides the exclusive method for criminal prosecution of corporate officers under the antitrust laws has been raised in three other pending cases; in one of them, the indictment was recently dismissed as to the individual defendants.[10] The same contention will undoubtedly be made in all pending criminal cases under the Sherman Act in which corporate officials are defendants.[11] Prompt resolution of the issue by this Court is therefore important.

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[10] *United States* v. *A. P. Woodson Company*, Criminal No. 375-61 (D.D.C.); *United States* v. *American Natural Gas Co.*, Criminal No. 59 Cr. 145 (N.D. Ill.); *United States* v. *Milk Distributors Association, Inc.*, Criminal No. 25658 (D. Md.). In the *Woodson* case the district court dismissed the indictment as to the individual defendants on September 21, 1961.

[11] The government could, of course, file superseding indictments, or informations, in cases where the indictment is dismissed as to the individual defendants and such a proceeding would not be barred by the statute of limitations. Such procedure would have at least three undesirable features. First, it would entail additional—and unnecessary—work. Second, it might introduce complexities at the trial. Third—and most serious—it would permit a maximum fine of only $5,000.

CONCLUSION

The question presented by this appeal is substantial and of public importance. Probable jurisdiction should be noted.

Respectfully submitted.

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OCTOBER 1961.

APPENDIX A

In the United States District Court for the Western District of Missouri, Western Division

UNITED STATES OF AMERICA, PLAINTIFF

v.

NATIONAL DAIRY PRODUCTS CORPORATION AND RAYMOND J. WISE, DEFENDANTS

No. 20542

[Entered by Judge R. Jasper Smith on June 14, 1961]

MEMORANDUM AND ORDER

Several motions filed by defendants are pending for ruling.

I

Defendant Wise has renewed his motion to dismiss Counts 11 and 12 (Section 1, Sherman Act Counts) of the indictment. This motion was submitted earlier and was overruled on March 6, 1961. Leave was given at that time to refile the motion after the Government had filed its bill of particulars.

In the motion defendant contends that he cannot be properly indicted under Section 1 of the Sherman Act, Section 1, Title 15, U.S.C.A., for acts done on behalf of and as a representative of his corporate employer National Dairy Products Corporation, when the acts are alleged to constitute a violation of Section 1 by the corporation. Defendant contends that in such circumstances, he must be indicted under Section 14 of the Clayton Act, Section 24, Title 18, U.S.C.A.

The motion tenders a complicated question as to criminal liability and responsibility of a corporate officer under the statutory framework of the anti-trust laws. Under cases cited by the parties, it is apparent that much doubt and uncertainty existed prior to the enactment of Section 14 of the Clayton Act. See, for example, *United States* v. *McAndrews & Forbes Co.*, 149 F. 823 (S.D. N.Y. 1906); *Union Pacific Coal Co.* v. *United States*, 173 F. 737 (8th Cir. 1909); *United States* v. *Swift*, 188 F. 92 N.D. Ill. 1911); *Nash* v. *United States*, 229 U.S. 373 (1913).

Since enactment of Section 14, several cases have involved that section, but in none of them have the courts been faced squarely with the issues presented here, namely, whether the Sherman Act or Section 14 of the Clayton Act governs the prosecution of a corporate officer, charged under the anti-trust laws solely because he authorized, ordered or did acts constituting a corporate violation. A number of cases since 1914, the date of enactment of Section 14 of the Clayton Act, have recognized the applicability of that statute where individual defendants as officers having active management, direction and control of the corporation, have been indicted. See *United States* v. *Atlantic Commission Company*, 45 F. Supp. 187 (E.D. N.C. 1942); *United States* v. *General Motors Corporation*, 26 F. Supp. 353 (N.D. Ind. 1939). See also *Hartford Empire Company* v. *United States*, 323 U.S. 386 (1945). In those cases the problem was not, as here, highlighted by the fact that in 1955, Congress raised the fine provided by Section 1 of the Sherman Act while not disturbing the fine provided by Section 14 of the Clayton Act.

Here we have a situation where the principal and an employee are both charged with violation of Section 1 of the Sherman Act. Nothing in the indict-

ment specifically alleged that defendant Wise was acting in an individual capacity, and the broad inference of the indictment was that he acted solely within the scope of Section 14 of the Clayton Act. In that posture a bill of particulars was ordered, and in the bill it was stated that, "* * * the defendant Wise, in actively and directly engaging in the alleged offenses, is alleged to have been acting solely in his capacity as an officer, director, or agent who authorized, ordered, or did some of the acts constituting in whole or in part the violations alleged also to have been committed by National Dairy Products Corporation of which he was an officer, director, or agent."

While it is undoubtedly true that a bill of particulars does not occupy the status of an amendment to an indictment, it may be considered in determining ambiguous language; and under those circumstances it seems perfectly clear that the sole issue presented now is whether or not an individual, charged solely in his representative capacity and not in any degree on an individual basis for his own personal account, may be charged with a violation of Section 1 of the Sherman Act.

It is my view that he cannot. There can be no question but that confusion and uncertainty existed prior to 1914 when Section 14 was enacted. Equally, there can be no question but that Congress in enacting Section 14, the "personal guilt" provision, intended to eliminate that uncertainty and confusion. It is clear that since 1914 it constituted no problem until the amendment to the punishment section for Section 1; and the fact that no challenge has been made of the question during that time is of little significance. Under clear Congressional interpretations, the Sherman Act governs the prosecution and

punishment of principals, i.e., corporations and individuals acting on their own behalf, while Section 14 of the Clayton Act covers the prosecution and punishment of individuals who, as corporate officials, took part in the corporate violation. This interpretation is supported by the wording and legislative history of Section 14, and is in accord with the fundamental principle that courts are bound to give effect to the various sections of legislation and should avoid a construction which would render a statute a nullity. Any other interpretation would leave Section 14 without content or force.

The motion of defendant Wise to dismiss Counts 11 and 12 as to him is sustained. Counsel for the Government will prepare appropriate order of dismissal within fifteen (15) days.

II

In view of the ruling on the motion to dismiss, the alternative motion of defendant Wise for severance and separate trial of Counts 11 and 12 is overruled. For the same reason, the alternative motion of defendant Wise joining in certain additional motions of defendant National is overruled.

III

Defendant National has moved for an order directing compliance with the Court's order of March 17, 1961, requiring particulars. As it relates to the particulars set forth in Part II, 1(b) and 3(d), the motion is overruled. As it relates to Part II, 2 and 3(a), it is my view that the Government has not complied with the order of March 17, 1961, requiring particulars, and the motion is therefore sustained, and the Government is directed to file supplemental particulars within thirty (30) days.

As it relates to Part III, 3(b), the Government has conceded that through inadvertence a portion of the material required was omitted. To the extent of the omitted portion, the motion is therefore sustained as to this part, but as to all other portions of 3(b) of Part III, the motion is overruled.

IV

Defendant National has moved for entry of a pre-trial order with a proposed form of order. This motion is premature and is overruled. At an appropriate time this case will be scheduled for a pre-trial conference and at that time an order will be formulated controlling the issues and the manner of presentation of each party's case.

V

Defendant National has moved for an order directing issuance of subpoena duces tecum to certain third parties to be returnable in advance of trial. These motions are sustained and the Clerk is directed at such time as is requested by defendant to issue the subpoenas duces tecum to the parties named in the motion and supplemental motion filed by defendant, to be returnable fifteen (15) days in advance of trial in accordance with the motions.

VI

Defendant National has moved, purportedly under Rule 17(c), for the production of certain documents not obtained by the Government by process but which were presented to the grand jury on which are to be offered in evidence upon the trial.

This motion is overruled. Undoubtedly this goes beyond the scope of permissible discovery in criminal

cases. Under certain sharply restricted circumstances, in the interests of justice, it is sometimes necessary to disclose evidence that has been presented to a grand jury but no good cause is shown here.

IT IS SO ORDERED.

s/ R. JASPER SMITH,
District Judge.

KANSAS CITY, MISSOURI, *June 14, 1961.*

Attest: A true copy,

J. C. TRUMAN, *Clerk.*
By s/ D. D. DANIEL, Jr.,
Deputy.

APPENDIX B

In the United States District Court for the Western District of Missouri Western Division

UNITED STATES OF AMERICA, PLAINTIFF

v.

NATIONAL DAIRY PRODUCTS CORPORATION AND RAYMOND J. WISE, DEFENDANTS

Criminal Action No. 20542

[Entered August 10, 1961]

ORDER DISMISSING COUNTS ELEVEN AND TWELVE AS TO THE DEFENDANT RAYMOND J. WISE

Upon the renewed motion of the defendant RAYMOND J. WISE to dismiss Counts Eleven and Twelve of the indictment as to him, and the Court having considered such motion, together with briefs filed in support thereof and in opposition thereto, and having considered the indictment and bills of particulars filed by the United States of America,

and the Court being fully advised in the premises, FINDS AND HOLDS:

That the defendant Wise is alleged to have been acting solely in his capacity as an officer, director, or agent who authorized, ordered, or did some of the acts constituting in whole or in part the violations alleged also to have been committed by defendant National Dairy Products Corporation of which he was an officer, director, or agent; that accordingly he cannot be charged on the basis of such acts with a violation of Section 1 of the Sherman Act, and since the Government charges him and represents that it intends to charge him only under Section 1 of the Sherman Act in Counts Eleven and Twelve of the indictment, his renewed motion to dismiss said counts should be and hereby is sustained.

IT IS THEREFORE ORDERED that Counts Eleven and Twelve of the above entitled indictment be and they hereby are dismissed as to the individual defendant RAYMOND J. WISE.

ENTER:

s/ R. JASPER SMITH,
United States District Judge.

Dated: Aug 10 1961.

U.S. GOVERNMENT PRINTING OFFICE: 1961